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Before the
Federal Communications Commission
Washington, D.C. 20554

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In the Matter of	)	
	)	
1998 Biennial Regulatory Review --	)	
Review of the Commission's Broadcast	)	MM Docket No. 98-35
Ownership Rules and Other Rules	)	
Adopted Pursuant to Section 202 of	)	
the Telecommunications Act of 1996.	)	

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

COMMENTS OF TRIBUNE COMPANY

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In the Matter of	)	
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1998 Biennial Regulatory Review -- Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996.	)	MM Docket No. 98-35

COMMENTS OF TRIBUNE COMPANY

Tribune Company ("Tribune"), the corporate parent of 18 major-market television stations, four radio stations and four daily newspapers, hereby files its Comments in response to the Notice of Inquiry ("Notice") issued by the Federal Communications Commission ("FCC" or "Commission") reviewing, inter alia, the daily newspaper-broadcast cross-ownership rule (the "Rule" or the "newspaper cross-ownership rule"), codified at 47 C.F.R. § 73.3555(d).[1]

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[1] Tribune, through subsidiaries, owns and operates the following television stations: WPIX(TV), Channel 11, New York, New York; KTLA(TV), Channel 5, Los Angeles, California; WGN-TV, Channel 9, Chicago, Illinois; WPHL-TV, Channel 17, Philadelphia, Pennsylvania; WLVI-TV, Channel 56, Boston, Massachusetts; KDAF(TV), Channel 33, Dallas, Texas; KSWB-TV, Channel 69, San Diego, California; WGNX(TV), Channel 46, Atlanta, Georgia; KHTV(TV), Channel 39, Houston, Texas; KTZZ-TV, Channel 22, Seattle, Washington; WBZL(TV), Channel 39, Miami, Florida; KWGN-TV, Channel 2, Denver, Colorado; KTXL(TV), Channel 40, Sacramento, California; WXIN(TV), Channel 59, Indianapolis, Indiana; WTIC-TV, Channel 61, Hartford, Connecticut; WXMI(TV), Channel 17, Grand Rapids, Michigan; WGNO(TV), Channel 26, New Orleans, Louisiana; WPMT(TV), Channel 43, York, Pennsylvania. Through subsidiaries, Tribune also publishes the following daily newspapers: the Chicago Tribune, Chicago, Illinois; the Sun-Sentinel, Fort Lauderdale, Florida; the Orlando Sentinel, Orlando, Florida; the Daily Press,
(continued...)

I. INTRODUCTION & SUMMARY

Tribune has had a long and active role in newspaper publishing and in radio and television broadcasting. It has published its flagship newspaper, the Chicago Tribune, since 1847. Its first AM station, WGN, signed on in Chicago as an original "clear channel" signal in 1924. Three of Tribune's television stations, WGN-TV in Chicago, WPIX(TV) in New York and KTLA(TV) in Los Angeles, recently celebrated 50 years of continuous service to the American public. The free, over-the-air television broadcasting business, as well as the mass media marketplace in general, have changed dramatically since the middle 1970s when the Commission first adopted the newspaper cross-ownership rule. New competitors, such as cable, DBS and the Internet, now provide compelling information and entertainment to an audience that was once served only by newspaper, over-the-air television and radio. This new competition has fragmented the traditional media audience, reducing the over-the-air industry's audience share and newspaper industry's circulation to the point that, at least in the larger markets, it is impossible for a single entity to dominate the marketplace of ideas. Indeed, as The Wall Street Journal observed only yesterday in reporting that NBC is actively considering an alliance or merger with a cable network, "[T]aken as a group, the four major networks will lose money this year, and their ratings erosion, primarily to cable TV, is expected to continue."[2]

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[1] (...continued)
Newport News, Virginia. Tribune also owns, through subsidiaries, WGN(AM), Chicago, Illinois; KEZW(AM), Aurora, Colorado; and KKHK(FM) and KOSI(FM), Denver, Colorado.

[2] "NBC President Says Alliance is More Likely," Wall Street Journal, July 20, 1998 at B2.

For too long, the prevailing view at the FCC has been to assume, without proof, that all markets, large and small, have a shortage of "voices." This assumption ignores the technological revolution that has unfolded over the past two decades. Tribune's comments begin by asserting that these changes in the media market have undermined the scarcity concerns upon which the Rule was originally predicated. Tribune further asserts that the Commission's proper focus in this proceeding, as mandated by the Telecommunications Act of 1996, is exclusively on competition in the market. Tribune's comments then illustrate the intense competition and abundance of "voices" that exist in two of its television markets, Chicago and South Florida, and argue that the Commission must recognize the existence of these competing media outlets and eliminate or liberalize the Rule.

Tribune's comments also address a second FCC assumption -- that the common ownership of a daily newspaper and an over-the-air television station acts to the detriment of the American public by somehow reducing the viewpoint diversity in programming available in the marketplace. Tribune demonstrates, on the contrary, that these combinations actually increase the amount, quality and viewpoint diversity of local news and public affairs programming and that, in fact, continued maintenance of the Rule uniquely harms the over-the-air television viewer. Thus, even if the Commission considers its diversity policy as it reviews the Rule in this proceeding, it must still eliminate or liberalize the Rule in the largest media markets. The Rule and its related waiver policy, which essentially elevate ownership diversity over every other factor, do not advance the Commission's core policy of encouraging diversity in local news and public affairs programming because they ignore the significant entry barriers to new local news broadcasts faced by over-the-air stations.

Given this marketplace reality, the Commission should, at the very least, act to reduce these entry barriers by liberalizing the Rule or the waiver policy to allow over-the-air broadcasters to pursue the same significant, innovative newspaper-video news programming efficiencies that Tribune has used to create new cable news programming. Tribune submits that the success of the new media competitors that are not burdened by the cross-ownership rule requires the Commission to remove that burden or risk jeopardizing the ability of over-the-air stations to provide the news, children's, and public affairs programming the Commission has recognized serves the public interest. Such action will help reverse a trend that has artificially walled off over-the-air viewers from the benefits of efficient ownership combinations, combinations that could help to produce programming the Commission has consistently recognized serves the public interest.

II. GIVEN THE DRAMATIC DEVELOPMENTS IN THE MEDIA MARKETPLACE SINCE ITS ADOPTION, THE RULE WOULD NO LONGER BE SUBJECT TO MINIMUM CONSTITUTIONAL SCRUTINY

The tremendous breadth of competing options in today's media marketplace has overtaken and rendered obsolete the minimal constitutional protection originally accorded broadcast media; instead, broadcast regulation like the Rule should be evaluated against the heightened constitutional standards already applied to cable, newspapers and other non-broadcast media. The less protective standard of review for broadcast was developed because broadcasting was perceived as a "scarce" public resource requiring pervasive government control. The dramatic expansion of competition in broadcast and competing media since these permissive standards of review were articulated, however, has materially altered the factual underpinnings of the scarcity doctrine, and requires that any rule restricting the cross-ownership of television stations and newspapers be subject to intermediate scrutiny, a much more exacting inquiry than the Supreme Court engaged in when it upheld the existing Rule in 1978. See FCC v. NCCB, 436 U.S. 775, 802 (1978).[3] As a consequence, perpetuation of cross-ownership limitations like the Rule will require the Commission to demonstrate that the specific limitation "advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests," Turner Broad. Sys., Inc. v. FCC, 117 S. Ct. 1174, 1186 (1997). Tribune submits that in today's highly competitive media market, the Commission will be unable to make such a showing in support of the Rule.

A. The deferential standard of review originally afforded the Rule was based on the assumption that there was scarcity in the broadcast market.

The Rule was originally found constitutional after review under the deferential standard set forth in Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969). And, indeed, the Commission's showing in support of the Rule was minimal. The Commission's Report and Order adopting the Rule did not present any empirical or other evidence that ownership of a newspaper and a television station would impede viewpoint diversity; the Commission simply assumed that common ownership would tend to decrease diversity of viewpoints. Amendment of Section 73.34, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations, Second Report and Order, 50 F.C.C. 2d 1046, ¶ 111 (1975). When reviewing the Rule, the D.C. Circuit observed that the record contained

[3] The extent of these changes is catalogued at length in Section V, infra.

"little reliable 'hard' information." NCCB v. FCC, 555 F.2d 938, 956 (D.C. Cir. 1977). The Supreme Court commented that "the Commission did not find that existing co-located newspaper-broadcast combinations had not served the public interest, or that such combinations necessarily 'spea[k] with one voice' or are harmful to competition." FCC v. NCCB, 436 U.S. at 786 (internal quotation marks omitted). The Court characterized the Rule as merely "reasonable" and the Commission's predictive judgment "rational." Id.

This deferential standard of review was based on the perception that there was functional scarcity in the broadcast media. In Red Lion, the Supreme Court upheld the constitutionality of the Commission's "fairness doctrine," pursuant to which broadcasters were required to present a balanced discussion of matters of public concern. 395 U.S. at 369. The Court focused on the scarcity of broadcast frequencies, finding that

> Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish.

Id. at 388-89. The Court further reasoned that "[b]ecause of the scarcity [in the broadcast spectrum], the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium." Id. at 390. Subsequent cases confirm that broadcast spectrum "scarcity" is the doctrinal justification for a more lenient standard of review than would otherwise be applied to restrictions on speech like the Rule. See, e.g., Turner I, 512 U.S. at 640 (essential to the Red Lion doctrine are the "special physical characteristics of broadcast transmission"); FCC v. League of Women Voters, 468 U.S. 364, 377 (1984); Metro Broad., Inc. v. FCC, 497 U.S. 547, 566-67 (1990), overruled on other grounds, Adarand

Constructors, Inc. v. Pena, 515 U.S. 200 (1995); News America Publish., Inc. v. FCC, 844 F.2d 800, 811 (D.C. Cir. 1988) ("The Supreme Court has rested this lesser protection on the scarcity of broadcast frequencies . . . and has recognized that new technology may render the doctrine obsolete") (internal quotations and citations omitted); Time Warner Entertainment v. FCC, 105 F.3d 723, 724 n. 2 (D.C. Cir. 1997) (per curiam) (Williams, J., dissenting).[4]

Since the scarcity rationale was first invoked, the Supreme Court has recognized that subsequent technological developments might overtake the doctrine. "[T]he broadcast industry is dynamic in terms of technological change; solutions adequate a decade ago are not necessarily so now, and those acceptable today may well be outmoded 10 years hence." Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 102 (1973). Thus, the Supreme Court has expressly stated its willingness to reconsider the Red Lion standard upon "some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required." FCC v. League of Women Voters, 468 U.S. 364, 376-77 n.11 (1984). See also Arkansas AFL-CIO v. FCC, 11

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[4] The Supreme Court has recognized that the "pervasiveness" of and children's unique access to the broadcast medium justified the Commission's prohibition on indecent material during hours when children might be listening or watching. FCC v. Pacifica Found., 438 U.S. 726, 748-50 (1978) (radio); see also Denver Area Educ. Telecommunications Consortium v. FCC, 518 U.S. 727 (1996) (applying Pacifica rationale to cable television). However, this rationale for regulation has never been accepted except in the context of limitations on indecent expression, which are not implicated here. FCC v. League of Women Voters, 468 U.S. 364, 380 n. 13 (1984) (overturning FCC regulation prohibiting noncommercial stations from presenting editorials and distinguishing Pacifica because "we are faced not with indecent expression" and "no claim is made by the Government that the expression of editorial opinion by noncommercial stations will create a substantial 'nuisance' of the kind addressed in [Pacifica]"). Thus, the "pervasive nuisance" rationale does not provide a constitutional theory in support of a lenient standard of review for broadcast ownership -- as opposed to decency -- restrictions.

F.3d 1430, 1443 (8th Cir. 1993) (Arnold, J., concurring) (developments since Red Lion "raise a significant possibility that the First Amendment balance struck in Red Lion would look different today"); Syracuse Peace Council v. FCC, 867 F.2d 654, 681 (D.C. Cir. 1989) (Starr, J., concurring) ("[U]nder the Red Lion framework . . . the constitutionality of the fairness doctrine is linked in part to technological developments (and behavior) in the communications marketplace."); Branch v. FCC, 824 F.2d 37, 50 (D.C. Cir. 1987) (concluding that the FCC has already sent the "signal" mentioned in FCC v. League of Women Voters by deciding that the fairness doctrine was unconstitutional and should be abandoned); News America Publ'g, Inc. v. FCC, 844 F.2d 800 (D.C. Cir. 1988).

B. The Commission has recognized the marketplace changes and eliminated other structural rules.

The Supreme Court's market prediction has been realized. As demonstrated in Section V, since Red Lion was decided in 1969 and the Rule was promulgated in 1975, the technology for the delivery of video programming has undergone a veritable revolution. The dynamism and rapid development in the market for broadcast and other video program delivery systems have undermined the scarcity and diversity rationales originally invoked to justify the newspaper-broadcast cross-ownership rule.

The Commission itself has recognized these changes in liberalizing other ownership and structural rules designed to enhance diversity and/or increase competition in the broadcasting industry. Indeed, such revisions are constitutionally and statutorily required where, as here, the passage of time has undermined the original justification for a rule. Meredith Corp. v. FCC, 809

F.2d 863, 874 (D.C. Cir. 1987); Syracuse Peace Council, 2 FCC Rcd. 5043, ¶ 8 n.8 (1987). In each instance, the Commission found that the relevant broadcast market had developed so fully, and diversification of programming was so extensive, as to require repeal of the restrictive ownership or programming rule under consideration. Tribune submits that these same findings require a similar repeal or liberalization of the Rule.

1. Reconsideration of the Fairness Doctrine.

In the mid 1980s, the Commission reconsidered the constitutionality of the fairness doctrine, the Commission's ultimate attempt to ensure viewpoint diversity in programming. In response to a directive from the D.C. Circuit, the Commission issued an order that expressly found the fairness doctrine unconstitutional based on the "explosive growth in the number and types of information sources available in the marketplace" such that "the public has 'access to a multitude of viewpoints without the need or danger of regulatory intervention.'" Syracuse Peace Council, 2 FCC Rcd. 5043, ¶¶ 4, 64 (1987) (quoting Inquiry Into Section 73.1910 of the Commission's Rules and Regulations Concerning Alternatives to the General Fairness Doctrine Obligations of Broadcast Licensees, 102 F.C.C.2d 142, 224 (1985)). The Commission concluded that "[t]o the extent that the [Supreme] Court is concerned about numerical scarcity in [broadcasting], . . . with the explosive growth in the number of electronic media outlets in the 18 years since Red Lion, there is no longer a basis for this concern." Syracuse Peace Council, ¶ 37 n.106.

2. 1984 Television Deregulation Order.

At approximately the same time, the Commission eliminated several policies and rules regarding programming and license renewal processing, including a policy requiring full Commission review of any television station renewal that reflected "less than five percent local programming, five percent informational programming (news and public affairs) or ten percent total non-entertainment programming." Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations, Report and Order, 98 F.C.C. 2d 1075, ¶ 5 (1984) ("Television Deregulation Order"). The Commission found that market forces would stimulate the desired mix of informational, local and non-entertainment programming without regulatory intervention, in part because

> Many new video technologies such as subscription Television (STV), Multipoint Distribution Service (MDS), Satellite Master Antenna Television (SMATV), Low Power Television (LPTV), Direct Broadcast Satellite (DBS), Multi-Channel MDS (MMDS) and Instructional Television Fixed Service Stations (ITFS) have begun, or are just beginning, to assert themselves in the marketplace . . . . The emergence of these new technologies, coupled with the continued growth in the number of television stations, will create an economic environment that is even more competitive than the existing marketplace. Given the market-based demand for these types of programming . . . this increased level of competition can, in our view, only further ensure the presentation of sufficient amounts of such programming.

Id. at 1085-86, ¶¶ 20-21.

3. Repeal of the Rules Designed to Curb the Power of Broadcast Networks.

In 1994 and 1995, the Commission repealed its financial interest and syndication ("fin/syn") rules as well as its prime time access rule ("PTAR"). These rules, contemporaries of the newspaper-television cross-ownership rule, were similarly designed to protect competition and the marketplace of ideas by placing broad constraints on the financing, ownership and programming practices of the television networks. The Commission reconsidered these rules and determined that, given competitive conditions in the television marketplace, they should be repealed in their entirety. See PTAR Report and Order, 11 FCC Rcd. 546 (1995); Evaluation of the Syndication and Financial Interest Rules, 8 FCC Rcd. 3282, ¶¶ 1, 3 (1993) ("Fin/Syn Second R&O"). In so doing, the Commission recognized the dramatic changes in the marketplace since their adoption, including the fact that network audience share had declined greatly, cable and independent television had grown significantly, competition among the three established networks and the Fox network had become intense, and first-run distribution had become a fully comparable alternative to network distribution for program producers. PTAR Report and Order, 11 FCC Rcd ¶ 21. The increased competition facing the networks and the new conditions in the television programming market eliminated the danger that repeal of the fin/syn rules or PTAR would impair the competition and diversity goals of these rules. Id. ¶¶ 3, 20; Fin/Syn Second R&O, ¶ 12.

4. Other Broadcast Ownership Rules.

The Commission has also liberalized other subsections of its broadcast ownership rule and/or their corresponding waiver policies in response to changes in the media marketplace. For example, in 1989 the Commission relaxed the waiver policy associated with its one-to-a-market rule that generally prohibited the common ownership of radio and television stations in the same market. In so doing, the Commission found that "circumstances have changed substantially in the eighteen years since [the rule was adopted] . . . . [T]oday there are many more outlets for information and viewpoints throughout all types of markets than there were in 1970" and "that the increased availability of broadcast outlets in large local markets has reduced the potential risk of harm to competition that would be caused by relaxing or modifying the radio-television cross-ownership rule in such markets."[5] Under the "case-by-case" standard adopted in this proceeding, the Commission now routinely grants permanent one-to-a-market waivers permitting the common ownership of a television station and up to four radio stations. See e.g., BREM Broadcasting, 9 FCC Rcd. 1333 (1994). Moreover, the Commission is currently considering the elimination or further relaxation of the one-to-a-market rule and has granted conditional waivers permitting the common ownership of a television station and as many as eight radio stations.[6]

The Commission again "recognized the need to adapt our rules to the changing marketplace" when it liberalized the number of AM and FM stations an entity could own locally, recognizing that "[t]he explosion of radio and other media since [it first applied local restrictions in 1938] has provided local consumers with a wide range of media choices and presented radio owners with multiple competitive challenges."[7] While the Commission's rules originally permitted the common ownership of only one AM and one FM radio station in the same market, the 1992 proceeding relaxed that restriction and permitted the common ownership of 2 AMs and 2 FMs in a market, subject to an audience share limit. Id. The Telecommunications Act of 1996 further relaxed the local radio ownership limit permitting up to 8 stations per market to be commonly

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[5] Amendment of Section 73.3555 of the Commission's Rules, the Broadcast Multiple Ownership Rules, Second Report and Order, 4 FCC Rcd. 1741, ¶¶ 24, 36 (1989) ("1989 Multiple Ownership Report").

[6] See Stockholders of Infinity Broadcasting Corp., 12 FCC Rcd. 5012, ¶¶ 95, 97 (1996).

[7] Revision of Radio Rules & Policies, Report and Order 7 FCC Rcd. 2755, ¶¶ 35-36 (1992).

owned. Newspaper/Radio Cross-Ownership Waiver Policy, 11 FCC Rcd. 13003, 13009 (1996). The 1996 Act also eliminated the national numerical limitations on the number of radio or television stations an entity could own and also repealed the statutory ban on local TV/cable cross-ownership. These ownership rule changes, initiated by the Commission and expanded by Congress, reflect the dramatic changes in the media marketplace over the previous 23 years.

C. With the liberalization and elimination of the Commission's other broadcast ownership and programming rules, the Rule now impermissibly and unconstitutionally singles out newspapers.

The Commission's continued retention of the Rule, complete with its liberalization of its other ownership and programming rules, has had the additional effect of disproportionately burdening newspapers. Ordinarily, the press is entitled to the highest degree of constitutional protection. See, e.g., New York Times Co. v. Sullivan, 376 U.S. 254 (1964). Notwithstanding this general principle, in FCC v. NCCB, the Supreme Court countered the argument that the Rule "singled out" newspapers in violation of the First and Fifth Amendments by pointing out that "the regulations treat newspaper owners in essentially the same fashion as other owners of the major media of mass communications were already treated under the Commission's multiple-ownership rules." FCC v. NCCB, 436 U.S. at 801. Since that decision, as noted above, most of the Commission's other restrictive ownership rules have been liberalized -- changes that have had the effect of unfairly putting newspapers at a competitive disadvantage vis-a-vis other comparable media outlets. In this transformed regulatory environment, the Rule's discriminatory impact on the press can no longer be constitutionally justified.

D. At a minimum, the Commission would be required to show that the Rule can withstand intermediate scrutiny, in that it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests.

In the absence of scarcity, the Rule and its related waiver policy, which is tantamount to a virtual prohibition on cross-ownership, would be subject to heightened First Amendment scrutiny.[8] Two recent Court of Appeals decisions demonstrate that, if reviewed today, the Rule would be upheld only if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests. Both decisions involved challenges to section 533(b) of the Cable Franchise Policy and Communications Act of 1984, which made it unlawful for a telephone company to provide video programming in its telephone service area. In both decisions, the

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[8] The NOI succinctly observed that "[a]lthough the Commission, in adopting the [R]ule, noted its expectation that there could be meritorious waiver requests, it set forth very stringent waiver criteria. As a result, only two cases, both involving television/newspaper combinations, have been found to warrant permanent waiver of the [R]ule." NOI ¶ 28. The NOI understates reality -- the potential for a permanent waiver to permit the new common ownership of a newspaper and a television station under the FCC's current waiver policy was and is a nullity. Despite the Commission's recognition that there could be meritorious waiver requests in the Second Report and Order originally adopting the Rule, the Commission's waiver cases reveal that absent a showing of imminent financial collapse and a likely loss of service, no showing of substantial benefits to the public or the absence of any real harm to the diversity or competition in a market can be expected to result in permanent relief from the Rule. See, e.g., Hopkins Hall Broad., Inc., 10 FCC Rcd. 9764, ¶¶ 10-15 (1995) (public interest benefits from combination are not considered); Capital Cities/ABC, 11 FCC Rcd. 5841, ¶¶ 82-83 (1996) (pre-existing radio-newspaper combinations granted only six-month temporary waivers despite minimal impact on market from common ownership); Shareholders of Renaissance Corp., 12 FCC Rcd. 11866, ¶¶ 49-55 (1997) (only one-year temporary waiver warranted despite non-dominance of television and newspaper proposed to be commonly owned and presence of significant public interest benefits and substantial number of voices in market). The Commission's recent decision to permit a new radio-newspaper combination does not alter this analysis. See Columbia Montour Broadcasting Co., Inc., FCC 98-114, ¶ 20 (released June 11, 1998) (recognizing the likely loss of AM service without permanent waiver).

courts applied intermediate scrutiny and held that the statutory prohibition on cross-ownership of a telephone and a cable company violated the First Amendment. These cases demonstrate that the federal courts will henceforth demand a close nexus between any ownership rule and the purported diversity interest to be served. See US West, Inc. v. United States, 48 F.3d 1092 (9th Cir. 1995); Chesapeake & Potomac Tel. Co. v. United States, 42 F.3d 181 (4th Cir. 1994).

Applying intermediate scrutiny, the Ninth Circuit concluded that the cross-ownership ban was unconstitutional because there was insufficient evidence to demonstrate that the ban would foster competition in the cable industry or promote diversity in programming, and that less restrictive means of achieving diversity were available. US West, Inc., 48 F.3d at 1101-1106. The Fourth Circuit reached similar conclusions. In Chesapeake & Potomac, 42 F.3d at 198-203, the court observed, after looking at the history of Section 553(b), that "the FCC's reasoning does not indicate that attention was devoted to the possibility of other, less drastic regulatory schemes that might achieve the substantial government interests enunciated above." As these cases illustrate, once the scarcity rationale is eliminated, the Rule must be based on substantial evidence that the particular restriction will promote a significant government interest without suppressing substantially more speech than is necessary. Given today's marketplace realities, the FCC will be unable to show that the competitive market is incapable of creating diversity in local news and public affairs programming, and that the Commission is required to ban speech by the publisher of a local newspaper over radio and television in order to preserve competition and program diversity.

III. THE COMMISSION'S AUTHORITY TO MAINTAIN ITS OWNERSHIP RULES HAS BEEN LIMITED BY SECTION 202(h) TO CONSIDERATION OF WHETHER COMPETITION HAS RENDERED ITS OWNERSHIP RULES UNNECESSARY

In its enactment of Section 202(h) of the Telecommunications Act of 1996 (the "Act"), Congress, too, evinced its conclusion that scarcity no longer provides a basis for Commission regulation, and that achieving diversity in the market should be left to competitive forces. Section 202(h) directs the Commission to determine whether its broadcast ownership rules are "necessary in the public interest as the result of competition."[9] The unambiguous language of the Act requires the Commission to assess the impact of competitive developments in the market in determining whether its broadcast ownership rules continue to be in the public interest.

Nonetheless, the Commission has expressed its intention to determine whether its ownership rules "are no longer in the public interest as we have traditionally defined it in terms of our competition and diversity goals." NOI ¶ 3. Such an interpretation of Section 202(h), to the

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[9] Section 202(h) provides:

> The Commission shall review its rules adopted pursuant to this section and all of its ownership rules biennially as part of its regulatory reform review under section 11 of the Communications Act of 1934 and shall determine whether any of such rules are necessary in the public interest as the result of competition. The Commission shall repeal or modify any regulation it determines to be no longer in the public interest.

Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996). As noted in the NOI, the rules subject to biennial review include rules pertaining to cable as well as broadcast cross-ownership.

extent that it does not recognize Congress's clear directive to focus on competitive market forces, would be impermissible under Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).[10] Accordingly, the Commission can no longer maintain its regulatory ownership restrictions simply by invoking its "traditional" prediction that more voices guarantee more diversity. As demonstrated by Tribune's comments, Congress's change in focus is readily understandable. The incredible array of media outlets currently available in the market -- outlets that have produced endless information of every variety completely independent of Commission regulations designed to enhance diversity -- has rendered the Commission's traditional approach obsolete.

Both principles of statutory construction and the legislative history of the Act make clear that Congress intended for the Commission to change its traditional regulatory approach to the broadcast industry by placing its principal reliance on market forces. First, by explicitly emphasizing competition and omitting any mention of diversity, the plain language of Section 202(h) clearly signals this revised approach. At the time Congress enacted Section 202(h), it certainly was aware of the fact that "[f]or more than half a century, the Commission's regulation of broadcast service has been guided by the goals of promoting competition and diversity," NOI ¶ 4, and that the twin goals of competition and diversity together comprised what the Commission has viewed as its "public interest mandate." Id. Nonetheless, Congress

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[10] In Chevron, the Supreme Court set out the now familiar two-step approach an agency must take when interpreting a statute. First, the agency must ask "whether Congress has directly spoken to the precise question at issue." Id .at 842. If so, "that is the end of the matter; for the . . . agency[] must give effect to the unambiguously expressed intent of Congress." Id. at 842-43. Only if "the statute is silent or ambiguous with respect to the specific issue," may the agency propose its own interpretation. Id. at 843.

conspicuously made no mention of "diversity" in Section 202(h), and instead directed the Commission to determine whether its ownership rules were still necessary "as the result of competition."[11] Given this language, it should be inferred that Congress intended the Commission to focus on market forces in evaluating the continuing need for its rules and to discard its traditional insistence on preserving the number of separately owned voices in the name of diversity.

Second, the legislative history of the Act clearly reveals Congress's intent that the Commission change its regulatory approach in evaluating the continuing need for its broadcast ownership rules. The House Report, prepared by the Committee on Commerce, noted that "[t]he audio and visual marketplace . . . has undergone significant changes over the past fifty years and the scarcity rationale for government regulation no longer applies." H.R. Rep. No. 104-204, at 54 (1995), reprinted in 1996 U.S.C.C.A.N. 10, 18. The Report continued:

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[11] The Commission's suggestion that Section 202(h) permits it to undertake a far-reaching diversity analysis is inconsistent with the statutory construction principle expressio unius est exclusion alterius, or, the "mention of one thing implies the exclusion of another thing." Ethyl Corp. v. EPA, 51 F.3d 1053, 1061 (D.C. Cir. 1995) (internal quotation omitted). The expressio unius maxim has particular force here because Congress, in enacting other sections of the Act with purposes similar to Section 202(h), did make specific reference to the "diversity" aspect of the Commission's public interest standard. See Russello v. United States, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (internal quotation marks omitted); Halverson v. Slater, 129 F.3d 180, 186 (D.C. Cir. 1997) (recognizing this principle as a rule of statutory construction). For example, Congress directed the Commission to conduct a proceeding to identify and eliminate market entry barriers for entrepreneurs and small businesses in the provision and ownership of telecommunications services and information services. See 47 U.S.C. § 257(a). Congress specifically instructed the Commission that, in executing its statutorily mandated review in that regard, it "shall seek to promote the policies and purposes of this Act favoring diversity of media voices, vigorous economic competition, technological advancement, and promotion of the public interest, convenience, and necessity." Id. § 257(b) (emphasis added).

> Today, there are in excess of 11,000 radio stations and over 1,100 commercial television stations, a 30 percent increase in the number of stations from just ten years ago. In addition, a fourth network has developed and two new networks are being launched. There is also competition from cable systems as suppliers of video programming. Cable systems pass more than 95 percent of all U.S. television households and 65 percent of U.S. television households subscribe to cable. In addition, other technologies such as wireless cable, low power television, backyard dishes, satellite master antenna television service (SMATV) and video cassette recorders (VCRs) provide consumers with additional program distribution outlets that compete with broadcast stations. To date, twenty four telephone companies have applied to provide "video dialtone service" to customers over phone lines. . . . This explosion of programming distribution sources calls for a substantial reform of Congressional and Commission oversight of the way the broadcasting industry develops and competes.

H.R. Rep. No. 104-204, at 54-55 (1995), reprinted in 1996 U.S.C.C.A.N. 10, 18-19. Having acknowledged the striking changes in the level of competition in the media marketplace over the past fifty years, the Committee concluded:

> To ensure the industry's ability to compete effectively in a multichannel media market Congress and the Commission must reform Federal policy and the current regulatory framework to reflect the new marketplace realities. To accomplish this goal, the Committee chooses to depart from the traditional notions of broadcast regulation and to rely more on competitive market forces.

H.R. Rep. No. 104-204, at 55 (1995), reprinted in 1996 U.S.C.C.A.N. 10, 19 (emphasis added). The Committee report thus confirms Congress's intent that the Commission "depart from" its "traditional notion" of the public interest and instead focus on "competitive market forces" in its approach to regulating the broadcast industry. This change in focus is not merely sensible; in light of the development in all relevant markets, it is constitutionally required.

Both the plain language and legislative history of Section 202(h) unambiguously express Congress's intent that the Commission rely on the marketplace in its regulatory approach to the broadcast industry. The Commission must give effect to Congress's intent by examining the changes in the media marketplace and repealing or modifying those rules no longer necessary as a result of those changes. In so doing, the Commission may not simply cling to its traditional inclination to maintain separately owned outlets solely for the sake of diversity. Congress has clearly indicated that ordinarily, competition will provide adequate protection of the public interest. Thus, any decision to depart from reliance on market forces must be accompanied by a complete explanation of the diversity objective sought to be achieved and a clear demonstration that market forces will not produce the desired objective.

IV. THE COMMISSION HAS AN INDEPENDENT OBLIGATION TO RECONSIDER A RULE WHEN THE FACTUAL PREDICATE UNDERLYING THE RULE IS NO LONGER VALID

Congress has made clear that, given the competitive developments in the media market, it no longer believes that scarcity justifies the Rule. Tribune's own showing in these Comments, see Section V, infra, further illustrates this conclusion. This well-documented, dramatic change in the commercial marketplace has undermined the key factual predicate for the Rule, namely that scarcity in the broadcast market required intrusive and draconian government intervention to protect the public's access to diverse viewpoints. Since that factual (and legal) predicate for the Rule is no longer valid, the Commission has an independent obligation under established judicial precedents to reconsider -- and eliminate -- the Rule. See Bechtel v. FCC, 957

F.2d 873 (D.C. Cir. 1992) ("Bechtel I"); Geller v. FCC, 610 F.2d 973 (D.C. Cir. 1979) (per curiam).

In Bechtel I, a license applicant claimed that "the reality of the current regulatory environment" was at odds with the continued application of the Commission's integration policy pursuant to which licenses were awarded between competing applicants. 957 F.2d at 880-81. In ruling that the Commission was required to respond to the applicant's arguments about changed circumstances, the D.C. Circuit concluded that "it is settled law that an agency may be forced to reexamine its approach 'if a significant factual predicate of a prior decision . . . has been removed.'" Id. at 881 (quoting WWHT, Inc. v. FCC, 656 F.2d 807, 819 (D.C. Cir. 1981)). The court explained that the Commission's "necessarily wide latitude to make policy" was accompanied by a "correlative duty to evaluate its policies over time." Id. at 881; see also National Broad. Co. v. United States, 319 U.S. 190, 225 (1943) ("If time and changing circumstances reveal that the 'public interest' is not served by application of the Regulations, it must be assumed that the Commission will act in accordance with its statutory obligations.").

Similarly, in Geller, the D.C. Circuit concluded that where a significant factual predicate of a prior decision to promulgate a rule has been removed, the agency may be forced by a reviewing court to address the continued validity of the rule. 610 F.2d at 979-80. Thus, where allegations "alert the Commission to the possibility that the regulations . . . lacked a nexus with the public interest," the Commission must reevaluate those regulations. Id. at 980; see also Cincinnati Bell Tel. Co. v. FCC, 69 F.3d 752, 767 (6th Cir. 1995); Eagle-Picher Indust., Inc. v. EPA, 759 F.2d 905, 913 (D.C. Cir. 1985) (where "events occur or information becomes available after the statutory review period expires that essentially create a challenge that did not previously exist," the agency must reconsider its rule). As demonstrated at length below, changes in the media marketplace have undermined key factual predicates underlying the Rule, requiring the Commission to repeal or substantially liberalize it.

V. COMPETITIVE CHANGES IN THE MARKETPLACE REQUIRE THE ELIMINATION OF THE RULE OR THE RELAXATION OF THE WAIVER POLICY IN THE LARGEST MARKETS

Tribune wholeheartedly endorses the Newspaper Association of America's ("NAA's") Petition for Rule Making supporting the elimination of (or at least the liberalization of) the restrictions on the common ownership of daily newspapers and radio and television stations located in the same market. Tribune submits that the breathtaking changes in the mass media marketplace since the Rule was originally adopted require nothing less.

As the NAA Petition demonstrates, the media marketplace has been transformed by developments unimaginable at the time the Commission adopted the Rule in 1975 -- developments that have clearly eliminated the diversity and competitiveness concerns underlying the Rule. The sheer volume and extent of these changes can hardly be overstated. These changes include the development of new technologies that substantially increase the amount of news and entertainment programming available in the market. These technologies, which range from VCRs to cable to DBS and the Internet, combined with an increase in the number of cable programming services, over-the-air television and radio stations licensed by the Commission, have led to an information explosion in the market. In this setting, the Commission's original concerns about the ability of a